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Trustee for the consolidated SIPA Liquidation of  
Bernard L. Madoff Investment Securities LLC  
and Bernard L. Madoff*

**UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK**

SECURITIES INVESTOR PROTECTION  
CORPORATION,

Plaintiff,

v.

BERNARD L. MADOFF INVESTMENT  
SECURITIES, LLC,

Defendant,

In re:

BERNARD L. MADOFF,

Debtor.

Adv. Pro. No. 08-01789 (BRL)

SIPA LIQUIDATION

(Substantively Consolidated)

**TRUSTEE'S COUNTER-DESIGNATION OF ITEMS TO BE INCLUDED IN THE  
RECORD ON APPEAL AND COUNTER-STATEMENT OF ISSUES TO BE  
PRESENTED ON APPEAL**

Pursuant to Rule 8006 of the Federal Rules of Bankruptcy Procedure, Appellee Irving H. Picard (“Trustee”), trustee for the substantively consolidated liquidation of Bernard L. Madoff

Investment Securities LLC (“BLMIS”) under the Securities Investor Protection Act, 15 U.S.C. § 78aaa *et seq.*, and the estate of Bernard Madoff individually, hereby submits the following counter-designation of additional items to be included in the record on appeal (the “Counter-Designation”) and counter-statement of the issues to be presented on appeal (the “Counter-Statement”) in connection with the appeal by Appellants Martin M. Surabian (deceased), Richard Surabian and Steven Surabian (collectively, the “Appellants”) from (a) Bench Ruling Denying Motion for Late Appeal of Distribution Order and Refraining From Ruling on the Motion for Late Appeal of Expungement Order (ECF No. 5325), and (b) Memorandum Decision and Order Denying Surabians’ (I) Vacate Motion, (II) Late Opposition Motion, (III) Madoff Subpoena Motion, and (IV) Records Subpoena Motion (ECF No. 5326), both entered on April 25, 2013, by the United States Bankruptcy Court for the Southern District of New York (Lifland, J), and respectfully submits as follows:

**COUNTER-DESIGNATION OF ADDITIONAL ITEMS TO BE INCLUDED  
IN THE RECORD ON APPEAL**

The Trustee hereby counter-designates the following items filed in the main bankruptcy proceeding except where otherwise noted below, captioned *Securities Investor Protection Corporation v. Bernard L. Madoff Investment Securities LLC*, No. 08-1789 (BRL) (Bankr. S.D.N.Y.) to be included in the record on appeal:<sup>1</sup>

	<u>ECF No.</u>	<u>Description</u>
1.	12	Order signed on 12/23/2008 on Application for an Entry of an Order Approving Form and Manner of Publication and Mailing of Notices, Specifying Procedures For Filing, Determination, and Adjudication of Claims; and Providing Other Relief (Related Doc # 8), entered on December 23, 2008.

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<sup>1</sup> This counter-designation includes items that may already have been included in Appellants’ designation. However, because ECF Numbers were not uniformly provided by Appellants, in an abundance of caution, such items have also been included herein.

	<u>ECF No.</u>	<u>Description</u>
2.	1209	Opposition to trustee's determination of claim filed by Martin M. Surabian, Richard Surabian, Steven Surabian, entered on January 6, 2010.
3.	2133	Objection to motion of trustee for an order to schedule hearing on "Customer" issue filed by Steven Surabian, Richard Surabian, Martin M. Surabian, entered on April 5, 2010.
4.	2205	Order signed on 4/13/2010 regarding Trustee's Motion For an Order To Schedule Hearing on "Customer" Issue, entered on April 13, 2010.
5.	3641	Objection to Motion for entry of an Order Pursuant to Section 105(a) of the Bankruptcy Code and Rules 2002 and 9019 of the Federal Rules of Bankruptcy Procedure Approving an Agreement by and between the Trustee and The Picower BLMIS Account Holders and Enjoining Certain Claims Re: Claim Nos. 001895, 001897, 001949, 001896, 002185, 002186, 001802 and 003367 filed by Th[e] Surabians, entered on January 7, 2011.
6.	4732	Trustee's Third Omnibus Motion to Expunge Claims and Objections filed by David J. Sheehan on behalf of Irving H. Picard, entered on March 16, 2012.
7.	4733	Affidavit of Service of Trustee's Third Omnibus Motion to Expunge Claims and Objections (related document(s) 4732), entered on 03/16/2012.
8.	4737	Affidavit of Mailing for March 16, 2012 of Notice of Hearing on Trustees Third Omnibus Motion to Expunge Claims and Objections of Claimants That Did Not Invest with BLMIS or in Entities that Invested in BLMIS and Third Omnibus Motion to Expunge Claims and Objections of Claimants That Did Not Invest with BLMIS or in Entities that Invested in BLMIS (related document(s)4732), entered on March 19, 2012.
9.	4772	Affidavit of Service of Amended Notice of Adjournment of Hearing on (i) Trustee's First Omnibus Motion Seeking to Expunge Objections by Parties That Did Not File Claims, (ii) Trustee's Second Omnibus Motion Seeking to Expunge Objections by Parties That Did Not File Claims, and (iii) Trustee's Third Omnibus Motion to Expunge Claims and Objections of Claimants That Did Not Invest with BLMIS or in Entities that Invested in BLMIS (related document(s)4771), entered on April 18, 2012.
10.	4774	Affidavit of Service of Notice of Agenda for Matters Scheduled for Hearing on April 19, 2012 at 10:00 A.M. (related document(s)4773), entered on April 18, 2012.

	<u>ECF No.</u>	<u>Description</u>
11.	4775	Affidavit of Mailing for Notice of Adjournment of Hearing on (i) Trustee's First Omnibus Motion Seeking to Expunge Objections by Parties That Did Not File Claims, (ii) Trustee's Second Omnibus Motion Seeking to Expunge Objections by Parties That Did Not File Claims, and (iii) Trustee's Third Omnibus Motion to Expunge Claims and Objections of Claimants That Did Not Invest with BLMIS or in Entities that Invested in BLMIS (related document(s)4767), entered on April 18, 2012.
12.	4776	Affidavit of Mailing of Amended Notice of Adjournment of Hearing on (i) Trustee's First Omnibus Motion Seeking to Expunge Objections by Parties That Did Not File Claims, (ii) Trustee's Second Omnibus Motion Seeking to Expunge Objections by Parties That Did Not File Claims, and (iii) Trustee's Third Omnibus Motion to Expunge Claims and Objections of Claimants That Did Not Invest with BLMIS or in Entities that Invested in BLMIS AND Notice of Agenda for Matters Scheduled for Hearing on April 19, 2012 at 10:00 A.M. (related document(s)4773, 4771), entered on April 18, 2012.
13.	4779	Order signed on 4/19/2012 Granting Trustee's Third Omnibus Motion Seeking to Expunge Claims and Objections of Claimants that did not Invest With BLMIS or in Entities that Invested in BLMIS, entered on April 19, 2012.
14.	4792	Affidavit of Mailing for Order Granting Trustees Second Omnibus Motion Seeking To Expunge and Order Granting Trustees Third Omnibus Motion Seeking to Expunge (related document(s)4779, 4778), entered on April 24, 2012.
15.	4796	Transcript regarding Hearing Held on 04/19/2012 10:01AM regarding Trustee's First Omnibus Motion Seeking to Expunge Objections by Parties That Did Not File Claims; Trustee's Third Omnibus Motion to Expunge Claims and Objections; Trustee's Second Omnibus Motion Seeking to Expunge Objections by Parties That Did Not File Claims, entered on April 27, 2012.
16.	4920	Motion for Order Scheduling Hearing on Trustee's Motion Affirming Denial of Time-Based Damages Adjustment to Customer Claims filed by David J. Sheehan on behalf of Irving H. Picard, entered on July 17, 2012.
17.	4930	Motion for An Order Approving Second Allocation of Property to the Fund of Customer Property and Authorizing Second Interim Distribution to Customers filed by David J. Sheehan on behalf of Irving H. Picard, entered on July 26, 2012.

	<u>ECF No.</u>	<u>Description</u>
18.	4952	Objection to Motion for Order Scheduling Hearing on Trustee's Motion Affirming Denial of Time-Based Damages Adjustment to Customer Claims filed by Martin M. Surabian, Richard Surabian, Steven Surabian, entered on August 1, 2012.
19.	4965	Objection to Motion Authorizing Second Interim Distribution to Customers filed by Martin M. Surabian, Richard Surabian, Steven Surabian, entered on August 8, 2012.
20.	4984	Trustee's Reply to Objections to Trustee's Motion for an Order Approving Second Allocation of Property to the Fund of Customer Property and Authorizing Second Interim Distribution to Customers filed by David J. Sheehan on behalf of Irving H. Picard, entered on August 15, 2012.
21.	4997	Order Signed on 8/22/2012 Approving a Second Allocation of Property to the Fund of Customer Property and Authorizing Second Interim Distribution to Customers, entered on August 22, 2012.
22.	5001	Trustee's Reply to Objections to Trustee's Motion for an Order to Schedule Hearing on Time-Based Damages Issue filed by Jorian L. Rose on behalf of Irving H. Picard, entered on August 24, 2012.
23.	5003	Motion to Remove Trustee Irving H. Picard As Trustee For The Substantively Consolidated SIPA Liquidation Of Bernard L. Madoff Investment Securities LLC And Bernard L. Madoff filed by Richard Surabian, Steven Surabian, entered on August 27, 2012.
24.	5014	Transcript regarding Hearing Held on 8/22/2012 10:32AM Regarding Motion [on] an Order Approving Second Allocation of Property to the Fund of Customer Property and Authorizing Second Interim Distribution to Customers, entered on August 31, 2012.
25.	5019	Trustee's Objection to Motion to Remove Irving H. Picard as Trustee for the Substantively Consolidated SIPA Liquidation of Bernard L. Madoff Investment Securities LLC and Bernard L. Madoff filed by David J. Sheehan on behalf of Irving H. Picard, entered on September 4, 2012.
26.	5022	Scheduling Order regarding time-based damages signed on 9/5/2012, entered on September 5, 2012.
27.	5024	Transcript regarding Hearing Held on 09/05/2012 10:04AM Regarding Motion for Order Scheduling Hearing on Trustee's Motion Affirming Denial of Time-Based Damages Adjustment to Customer Claims, entered on September 11, 2012.

	<u>ECF No.</u>	<u>Description</u>
28.	5028	Reply to Trustee's Objection to Motion to Remove Irving H. Picard as Trustee for the Substantively Consolidated SIPA Liquidation of Bernard L. Madoff Investment Securities LLC and Bernard L. Madoff filed by Richard Surabian, Steven Surabian, entered on September 13, 2012.
29.	5031	Notice of Appeal regarding second interim distribution filed by Martin M. Surabian, Richard Surabian, Steven Surabian, entered on September 20, 2012.
30.	5066	Trustee's Eighth Interim Report for the Period Ending September 30, 2012 filed by Irving H. Picard on behalf of Irving H. Picard, entered on November 5, 2012.
31.	5080	Order Signed on 11/14/2012 Denying Motion to Remove Irving H. Picard for the Substantively Consolidated SIPA Liquidation of Bernard L. Madoff Investment Securities LLC and Bernard L. Madoff, entered on November 14, 2012.
32.	5115	Transcript regarding Hearing Held on 11/14/2012 10:17AM Re: Steven & Richard Surabian Motion to Remove Irving Picard as Trustee, entered on November 29, 2012.
33.	5136	Notice of Appeal regarding motion to remove Trustee filed by Martin M. Surabian, Richard Surabian, Steven Surabian, entered on December 4, 2012.
34.	5186	Motion to File Late Opposition to Trustee's Third Omnibus Motion to Expunge Claims and Objections of Claimants that Did Not Invest with BLMIS or in Entities that Invested in BLMIS and Motion to File Late Notice of Appeal of Order Granting Approval filed by Martin M. Surabian, Richard Surabian, Steven Surabian (related document(s)4732), entered on January 3, 2013.
35.	5187	Objection to Trustee's Third Omnibus Motion to Expunge Claims and Objections of Claimants that Did Not Invest with BLMIS or in Entities that Invested in BLMIS (related document(s)4732) filed by Martin M. Surabian, Richard Surabian, Steven Surabian, entered on January 3, 2013.
36.	5188	Motion to Subpoena Bernard L. Madoff filed by Martin M. Surabian, Richard Surabian, Steven Surabian, entered on January 3, 2013.
37.	5206	Motion to Vacate Order and Judgment of Trustee's Third Omnibus Motion to Expunge Claims and Objections of Claimants that Did Not Invest with BLMIS or in Entities that Invested in BLMIS Regarding the Surabians Claims Mentioned in Trustee's Exhibit A (related document(s)4779, 4732) filed by Martin M. Surabian, Richard Surabian, Steven Surabian, entered on January 23, 2013.

	<u>ECF No.</u>	<u>Description</u>
38.	5207	Notice of Motion to Vacate Order and Judgment of Trustee's Allowed Motion to Expunge Surabians Claims and Objections (related document(s)5206) filed by Martin M. Surabian, Richard Surabian, Steven Surabian, entered on January 23, 2013.
39.	5208	Notice of Appeal filed by Martin M. Surabian, Richard Surabian, Steven Surabian, entered on January 23, 2013.
40.	5209	Motion to Extend Time to Appeal filed by Martin M. Surabian, Richard Surabian, Steven Surabian, entered on January 23, 2013.
41.	5210	Notice of Motion to File Late Opposition and Motion to File Late Appeal and Motion to Subpoena Bernard L. Madoff and Motion to File Late Appeal from August 22, 2012 Order Approving the Trustee's Motion for an Order Authorizing Second Interim Distribution to Customers (related document(s)4997, 5188, 5186) filed by Martin M. Surabian, Richard Surabian, Steven Surabian, entered on January 23, 2013.
42.	5215	Notice of Adjournment of Briefing Schedules (related document(s)5188, 5206, 5209, 5186) filed by David J. Sheehan on behalf of Irving H. Picard. with hearing to be held on 3/20/2013 at 10:00 AM at Courtroom 623 (BRL), entered on January 31, 2013.
43.	5244	Memorandum of Law of the Securities Investor Protection Corporation in Opposition to the Surabians' Motion to File Late Objection to Expungement Motion, Motion to Vacate Expungement Order, and Motion to Subpoena Madoff (related document(s)5188, 5206, 5186), entered on February 28, 2013.
44.	5250	Trustee's Objection to Motions to Reconsider Order Expunging Claims and Objections of Claimants That Did Not Invest With BLMIS or Entities That Invested in BLMIS (related document(s)5206), entered on February 28, 2013.
45.	5251	Trustee's Objection to Motion of Steven, Richard and Martin Surabian to Subpoena Bernard L. Madoff (related document(s)5188), entered on February 28, 2013.

	<u>ECF No.</u>	<u>Description</u>
46.	5252	Declaration of Amy Vanderwal in Support of (1) Trustee's Objection to Motions to Reconsider Order Expunging Claims and Objections of Claimants That Did Not Invest With BLMIS or Entities That Invested in BLMIS and (2) Trustee's Objection to Motion to Subpoena Bernard L. Madoff (related document(s)5250, 5251) filed by David J. Sheehan on behalf of Irving H. Picard. (Attachments: # 1 Exhibit A - Part 1# 2 Exhibit A - Part 2# 3 Exhibit B# 4 Exhibit C# 5 Exhibit D# 6 Exhibit E# 7 Exhibit F# 8 Exhibit G# 9 Exhibit H), entered on February 28, 2013.
47.	5267	Letter to Judge re: Trustee's Objection to Motions filed by Martin M. Surabian, Richard Surabian, Steven Surabian, entered on March 11, 2013.
48.	5277	March 14, 2013 Letter to Judge Lifland in Response to the Surabians Request to Strike (related document(s)5267) filed by David J. Sheehan on behalf of Irving H. Picard, entered on March 14, 2013.
49.	5279	March 15, 2013 Letter to Judge Lifland in Response to Surabians Request to Strike (related document(s)5267) filed by Nathanael Kelley on behalf of Securities Investor Protection Corporation, entered on March 15, 2013.
50.	5290	Motion to Subpoena the Books and Records of BLMIS and Bernard L. Madoff and Motion to Subpoena the Records of SIPC and the Trustee Concerning the Customers and Payments to Customers and How They were Determined to be Customers of BLMIS filed by Martin M. Surabian, Richard Surabian, Steven Surabian, entered on March 25, 2013.
51.	5295	Trustee's Objection to Steven, Richard and Martin Surabian's Motion to Subpoena the Books and Records of BLMIS and Bernard L. Madoff and Motion to Subpoena the Records of SIPC and the Trustee Concerning the Customers and Payments to Customers and How They Were Determined to Be Customers of BLMIS (related document(s)5290), entered on April 03, 2013.
52.	5296	Memorandum of Law of the Securities Investor Protection Corporation in Opposition to the Surabians' Motion to Subpoena the Books and Records of BLMIS and Bernard L. Madoff and Motion to Subpoena the Records of SIPC and the Trustee Concerning the Customers and Payments to Customers and How They Were Determined to Be Customers of BLMIS (related document(s)5290), entered on April 4, 2013.

	<u>ECF No.</u>	<u>Description</u>
53.	5325	Minute Order signed on 4/25/2013 Denying Motion for Late Appeal of Distribution Order and Refraining from Ruling on the Motion for Late Appeal of Expungement Order (Related Doc # 5209, 5186), entered on April 25, 2013.
54.	5326	Memorandum Decision and Order Denying Surabians (I) Vacate Motion, (II) Late Opposition Motion, (III) Madoff Subpoena Motion, and (IV) Records Subpoena Motion (Related Doc #'s 5186, 5188, 5206 and 5290), entered on April 25, 2013. <sup>2</sup>
55.	5360	Notice of Appeal (related document(s)5326, 5327) filed by Martin M. Surabian, Richard Surabian, Steven Surabian, entered on May 10, 2013.

***Picard v. Access International Advisors, et al., Adv. No. 10-05208 (BRL)***

1.	53	Opposition to Motion for Entry Approving a Settlement Agreement By and Between the Trustee and Trotanoy Investment Company, LTD. (related document(s)50) filed by Steven Surabian, Richard Surabian, Martin M. Surabian, entered on April 05, 2012.
2.	55	Trustee's Response to Objection of Steven Surabian, Richard Surabian and Martin M. Surabian to Approval of a Settlement Between the Trustee and Trotanoy Investment Company Ltd., entered on April 30, 2012.
3.	63	Objection to Trustee's Response to Objection of Steven Surabian, Richard Surabian and Martin M. Surabian to Approval of a Settlement Between the Trustee and Trotanoy Investment Company Ltd., entered on June 15, 2012.
4.	60	Transcript regarding Hearing Held on 05/15/2012 10:09AM RE: Motion for Entry of Order Pursuant to Section 105(a) of the Bankruptcy Code and Rules 2002 and 9019 of the Federal Rules of Bankruptcy Procedure Approving a Settlement Agreement By and Between The Trustee and Trotanoy Investment Company, Ltd., entered on May 24, 2012.

***Surabian v. Picard, No. 12-cv-07999 (KBF) (S.D.N.Y.)***

1.	15	ORDER granting Motion to Dismiss: In light of the above determinations, the Court finds it lacks jurisdiction to hear this appeal; the Trustee's motion to dismiss is GRANTED. Without jurisdiction to consider the appeal, the Court will not address the issue of standing or the additional arguments
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<sup>2</sup> Docket entry number 5327 is duplicative of 5326 as indicated by the docket text, "Redocketed for the sole purpose of reflecting that decision is now "FOR PUBLICATION."

		briefed by the parties. The Clerk of Court is directed to close the motion at ECF No. 6 and to terminate this action. (Signed by Judge Katherine B. Forrest on 1/25/2013), entered on January 28, 2013.
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**COUNTER-STATEMENT OF THE ISSUES TO BE PRESENTED ON APPEAL**

The Trustee hereby submits the following counter-statement of the issues on appeal:

1. Whether the Bankruptcy Court correctly denied Appellants' motion to vacate order expunging Appellants' claim and motion to file late opposition thereto, where the Bankruptcy Court found that reconsideration of its prior order expunging Appellants' claims was not warranted because (i) Appellants' failure to respond to the related expungement motion was willful, (ii) Appellants do not possess a meritorious defense to the expungement motion and provided no credible evidence that they were customers of BLMIS, and (iii) reconsideration would prejudice the Debtor's estate and its creditors.
2. Whether the Bankruptcy Court correctly denied the motion to subpoena Bernard Madoff to testify on behalf of the Appellants, after finding that the low probative value of Madoff's testimony, in conjunction with the cost and security concerns associated with transporting Madoff to the Bankruptcy Court, militated in favor of denial of a writ of *habeas corpus as testificandum*.
3. Whether the Bankruptcy Court correctly denied the motion to subpoena the books and records of BLMIS, the Trustee and SIPC, where the Bankruptcy Court found that neither the books and records of BLMIS nor those of the Trustee and SIPC are relevant to Appellants' claims and that, even if the requested discovery was relevant, the subpoenas were unduly burdensome.
4. Whether the Bankruptcy Court correctly denied the motion for late appeal of the order approving the Trustee's motion for an order granting the second interim distribution

to customers of BLMIS when the District Court had already denied the appeal as untimely.

5. Whether the Bankruptcy Court correctly refrained from considering the motion for late appeal of the order expunging the Appellants' claims when that appeal had been docketed in the District Court and was currently pending there.

Dated: New York, New York  
June 5, 2013

Respectfully submitted,

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